

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 4, 1999

IN RE:

**APPLICATION OF BELL SOUTH LONG DISTANCE,
INC. FOR A CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE OPERATOR SERVICES AND
RESELL INTEREXCHANGE TELECOMMUNICATIONS
SERVICES IN TENNESSEE**

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DOCKET NO. 97-01404

**ORDER GRANTING IN PART AND DENYING IN PART APPLICATION FOR
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY**

This matter is before the Tennessee Regulatory Authority (the "Authority" or "TRA") upon the application of BellSouth Long Distance Inc. ("BSLD") for a Certificate of Public Convenience and Necessity to Provide Operator Services and Resell Interexchange Telecommunications Services in Tennessee ("the Application"). At a Special Authority Conference held on December 8, 1998, the Authority unanimously determined that the Application should be granted in part and denied in part.

BSLD's Application was made pursuant to and considered in light of the criteria for granting a certificate of public convenience and necessity ("CCN") as set forth in Tenn. Code Ann. § 65-4-201 *et seq.*, Tenn. Code Ann. § 65-5-212 and Authority Rule 1220-4-2-.57.

LEGAL STANDARD FOR GRANTING CCN

BSLD's Application was considered in light of the criteria for granting a certificate of public convenience and necessity ("CCN") as set forth in applicable statutes. Tenn. Code Ann. § 65-4-201 provides, in part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate...

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

An authority order, including appropriate findings of fact and conclusions of law, denying or approving, with or without modification, an application for certification of a competing telecommunications service provider shall be entered no more than sixty (60) days from the filing of the application.

In addition, pursuant to Tenn. Code Ann. § 65-5-212, competing telecommunications providers are required to file with the Authority: (1) a statement containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information concerning programs that may provide technical assistance to such businesses.

BACKGROUND

On August 1, 1997, BSLD filed its Application pursuant to Tenn. Code Ann. § 65-4-201 for authority to operate in Tennessee as a reseller of long distance services. At a regularly

scheduled Authority Conference on September 9, 1997, the Directors appointed then-Director Melvin Malone to serve as Hearing Officer in this matter. A Pre-Hearing Conference was held on Thursday, September 18, 1997. At the Pre-Hearing Conference, counsel for BSLD agreed to supplement the Application and waived the sixty (60) day period for a decision under Tenn. Code Ann. § 65-4-201. On October 1, 1997, the Hearing Officer issued his Report and Recommendation that set forth a procedural schedule for discovery requests and briefing purposes. BSLD pre-filed the direct testimony of James G. Harralson on November 18, 1997. No other testimony was filed. This matter was originally scheduled for hearing before the Authority on December 18, 1997. On December 17, 1997, at the request of BSLD, the hearing date was continued and rescheduled for April 28, 1998. Following a public hearing on the merits held on April 28, 1998, the Authority deliberated this matter at a Special Authority Conference held on December 8, 1998.

INTERVENORS

Public notice of the hearing in this matter was given by the Authority's Executive Secretary, pursuant to Tenn. Code Ann. § 65-4-204. The following parties sought and were granted intervention: AT&T Telecommunications of the South Central States, Inc. ("AT&T"), NEXTLINK Tennessee, LLC ("NEXTLINK"), MCI Telecommunications Corporation ("MCI"), Time Warner Communications of the Mid-South, LP ("Time Warner"), the Communications Workers of America, AFL-CIO ("CWA") and TCG Mid South, Inc. ("TCG").

HEARING

The Authority held a public hearing on the merits on April 28, 1998. At the outset of the hearing the Authority heard arguments on a motion to dismiss filed by MCI and NEXTLINK.

The Authority voted to deny the motion and move forward with the hearing. BSLD presented the testimony of Mr. James G. Harralson its Vice President, General Counsel and Secretary. Mr. Harralson testified in support of BSLD's reseller application and provided updated information concerning BSLD's qualifications and proposed services.

I. APPLICANT'S QUALIFICATIONS

1. BSLD is a wholly owned subsidiary of BellSouth Corporation¹ ("BellSouth") and was organized in the State of Delaware on March 13, 1996, and has a Certificate of Authority to conduct business in this State, from the Tennessee Secretary of State.
2. BSLD's principal place of business is located 32 Perimeter Center East, Atlanta, Georgia 30346. Its Tennessee contact person is John A. Ruscilli whose telephone number is (707) 352-3000 and his fax number is (707) 352-3181.
3. The Application and supporting documentation existing in the record demonstrate that BSLD has approximately 145 employees including senior management personnel. Approximately 50% of those employees have their primary experience in the long distance industry while the remainders have traditional telephone company or other BellSouth experience.
4. To demonstrate its financial qualifications to provide the proposed services, BSLD filed financial statements for the year ending 1996 along with the 1996 Form 10K Report of BellSouth Corporation as support for its application to provide the services it proposes to offer.
5. BSLD has represented that it will adhere to all applicable policies, rules and orders of the Authority.

¹ BellSouth Long Distance is a wholly owned subsidiary of BellSouth Long Distance Holdings, Inc., which in turn is a wholly owned subsidiary of BellSouth Corporation. BellSouth Corporation also wholly owns BellSouth Telecommunications, Inc. ("BST").

6. The record in this cause demonstrates that BSLD, whether regulated or unregulated, is qualified, by virtue of certifications or registration, to provide telecommunications services in forty-nine (49) states and the District of Columbia. BSLD is currently authorized to provide the services applied for in eight (8) of the nine (9) BST states.²

7. BSLD has filed a small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-212 and has acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-213.

II. PROPOSED SERVICES

1. BSLD seeks authority to provide in Tennessee, the few long distance services not precluded at this time by Section 271 of the Federal Telecommunications Act of 1996 (the "Act"). Specifically, BSLD seeks certification to provide the incidental interLATA long distance services set forth in Section 271(g) of the Act on a resold basis. Section 271(g) sets forth those services as follows:

Section 271(g)

DEFINITION OF INCIDENTAL INTERLATA SERVICES. --- For purposes of this section, the term 'incidental interLATA services' means the interLATA provision by a Bell operating company or its affiliate —

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such

² The nine (9) states in which BST is authorized to provide telecommunications service are as follows: Tennessee, Alabama, Georgia, South Carolina, North Carolina, Kentucky, Florida, Mississippi and Louisiana.

company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5);

(3) of commercial mobile services in accordance with section 332(c) of the Act and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

2. BSLD seeks authority to provide resold intraLATA toll services.

3. BSLD seeks authority to provide the full array of interLATA services, on a resold basis, contingent upon the Federal Communications Commissions' ("FCC") approval of BST's Section 271 application, once such an application is filed.

III. ARGUMENTS OF THE PARTIES

The intervenors asserted that the Authority should deny BSLD's Application because it is premature. Therefore, the intervenors maintained that BST must first receive FCC approval of its Section 271 application prior to BSLD seeking certification from the Authority. NEXTLINK, Time Warner and MCI argued that the Authority is limited to granting a certificate for service

that BSLD is presently permitted to provide under federal law, namely the incidental interLATA services enumerated in Section 271(g) of the Federal Act. AT&T argued that BSLD should not be permitted to provide intraLATA services until BST has an approved toll dialing parity plan in place.³ The intervenors argued that the TRA has no authority to issue a contingent certificate which on its face would authorize BSLD to provide services in the future that are prohibited now by Federal law.

BSLD asserted that there is nothing in the Act nor in state statutes that prohibit state certification prior to FCC approval. The intervenors argued that the Authority does not have the ability to grant this authorization before BST secures Section 271 relief from the FCC. BSLD argued that the intervenors could assert that BSLD must secure authority from the state commissions before seeking relief from the FCC, thereby placing BSLD in “a catch twenty-two.” Further, BSLD argued that eight (8) of the nine (9) states in which BST operates have granted such authority to BSLD; this is the same authority which it now seeks in Tennessee.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. No party challenged BSLD’s managerial, financial and technical abilities to provide the applied for services. Accordingly, based on a review of BSLD’s application and the entire record in this matter, the Authority finds that BSLD satisfies the managerial, financial and technical requirements contained in Tenn. Code Ann. § 65-4-201(c). Further, pursuant to the additional requirements of Tenn. Code Ann. § 65-4-201(c), the Authority finds that BSLD has demonstrated its willingness to adhere to all applicable policies, rules and orders. Additionally BSLD has filed

³ On February 8, 1999, the Authority approved an intraLATA toll dialing parity plan filed by BST in Docket No. 97-01399. This plan was agreed to by AT&T, MCI, Sprint, NEXTLINK, Time Warner and the Consumer Advocate.

an acceptable small and minority-owned telecommunications business participation plan pursuant to Tenn. Code Ann. § 65-5-212.

2. The Authority finds that Section 271(g) of the Federal Act specifically authorizes a “Bell operating company or its affiliate” to provide certain incidental interLATA services prior to BST securing general relief from the FCC under Section 271.

3. The Authority finds that the Act does not preclude the Authority from certifying BSLD to provide intraLATA toll services on a resold basis.

4. The Authority finds that approval at this time of BSLD’s application regarding the interLATA services other than those incidental services identified in Section 271(g) of the Federal Act would amount to a contingent certificate. The contingency would be approval by the FCC of BST’s Section 271 application. BSLD cites no statutory authority or precedential authority to support the granting of a contingent certificate.⁴ Further, the United States Supreme Court has ruled that:

A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or may not occur at all.⁵

Thus far, no Bell Operating Company has been able to convince the FCC that it has met all the requirements of the Act to be allowed to offer interLATA long distance service in any

⁴ During the April 28, 1998, Hearing, counsel for BSLD candidly admitted that BSLD could not provide interLATA services (other than those specifically permitted under 47 U.S.C. § 271) until BST received FCC approval of its 271 Application. Counsel for BSLD also stated that if the Authority were to grant approval of BSLD’s request to provide resold in-region intraLATA toll services, such approval would be of use to the company as “a to-do item that [would be] checked off the list.” See April 28, 1998, Hearing Transcript at pp. 10-12. In light of the responses provided by BSLD’s counsel, the Directors cannot justify the grant of authority to provide services other than those provided for under 47 U.S.C. § 271(g) if BSLD is not permitted to provide those services until the condition precedent (FCC approval of BST’s 271 Application) has been fulfilled.

⁵ *Texas v. United States* 118 S. Ct. 1257 (1998).

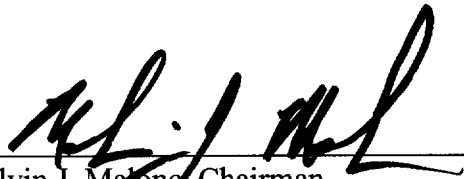
state. BST has failed in three attempts to receive Section 271 relief to provide interLATA services even with positive recommendations of the respective State Utility Commissions in South Carolina and twice in Louisiana. When BST might clear this hurdle is unknown.⁶ Accordingly, the Directors deny BSLD's request for authority to provide services that may be allowed after the FCC grants BST 271 relief.

IT IS THEREFORE ORDERED:

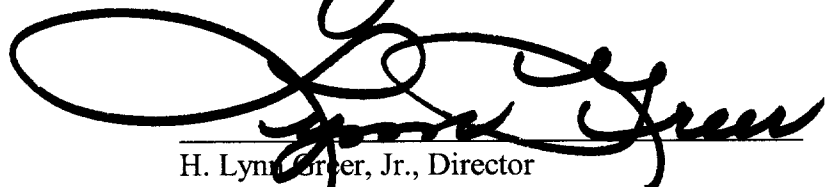
1. BSLD's Application for a certificate of public convenience and necessity pursuant to Tenn. Code Ann. § 65-4-201 is hereby granted so far as it concerns the provision of: (a) resold incidental interLATA services as defined in Section 271(g) of the Federal Act and set forth herein; and (b) resold intraLATA toll services.
2. BSLD's Application is denied with respect to its request for authority to provide resold in-region interLATA services other than those incidental services identified in Section 271(g) of the Federal Act;
3. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from the date of this Order.

⁶ On April 8, 1999, BST filed a Notice of Voluntary Dismissal Without Prejudice and Withdrawal of Advanced Notice of Section 271 Filing with the Authority in Docket No. 97-00309.

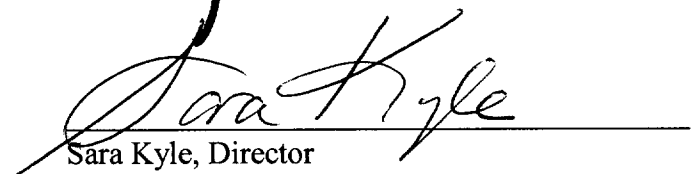
4. Any party aggrieved by the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section with sixty (60) days from the date of this Order.



Melvin J. Malone, Chairman

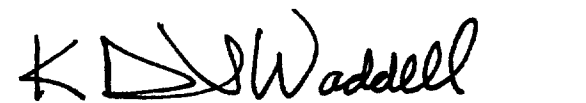


H. Lynn Greer, Jr., Director



Sara Kyle, Director

ATTEST:



K. David Waddell, Executive Secretary